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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

A. D. WOODARD AND
OKLAHOMA FURNITURE MFG. CO. ..... *Petitioners,*

v. No. 853

LEWIS M. ROBINSON, WM. M. BERRY
AND JAMES MALONE, COMPOSING THE
ARKANSAS PUBLIC SERVICE COMMISSION ..... *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE SUPREME COURT OF ARKANSAS

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PIONEER

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PETITION FOR WRIT OF *CERTIORARI* TO THE SUPREME COURT OF ARKANSAS

The above named petitioners pray this Court to issue a writ of *certiorari* to review the decision of the Supreme Court of Arkansas in the above-entitled cause and the order denying the petition for rehearing therein, and for cause show:

OPINIONS OF COURTS BELOW

The temporary restraining order issued by the Chancery Court of Pulaski County, Arkansas, on May 27, 1955, appears at page 21; the final decree of the Chancery Court dated April 15, 1956, at page 22; the decision of the Supreme Court of Arkansas, dated December 10, 1956, at page 26. This decision has not yet been officially reported; however, it is reported in 296 S. W. (2) 672. Petition for

rehearing at page 32, was filed December 19, 1956, and denied on January 7, 1957.

JURISDICTION

Jurisdiction to review by *certiorari* the decision of the Supreme Court of Arkansas is invoked under 28 USCA, § 1257 (3).

QUESTION PRESENTED FOR REVIEW

The single question is this: Is it an undue burden on interstate commerce to require a Lessor-Employee to obtain a state permit as an intrastate carrier when his Lessor-Employer is a private carrier by Federal law? To put it another way, may a state statute arbitrarily convert private carriage by federal law into contract carriage by state law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional questions are:

1) Whether there is an undue burden on interstate commerce contrary to Art. I, § 8, Clause 3, of the United States Constitution; and

2) The supremacy of an Act of Congress under Art. VI (2) over a state statute, both pertaining to interstate commerce.

The Federal statutory provisions involved are the Federal Motor Carrier Act, Part II, Interstate Commerce Act, 49 USCA, § 303 (a) (15) and (17); appearing at page 34.

The state legislation is the Arkansas Motor Carrier Act of 1955, being Act 397 of 1955, § 3; § 4; § 5 (a), (7), (8), (9), (14), (19); § 6 (a) (1), (2), (3); § 11 (a); § 22 (a) and (b); and part of § 25, all appearing at page 34 ff.

STATEMENT OF THE CASE

Petitioner, Oklahoma Furniture Manufacturing Company, is a Delaware corporation with its principal place of business in Guthrie, Oklahoma. It manufactures a line of low-priced furniture, consisting largely of bedroom furniture, upholstered living room furniture, dining room furniture, mattresses and bedsprings, and a patented steel bed slat. Raw materials are imported into Guthrie from various places throughout the eastern and middlewestern part of the United States. The sales area of the company is, in general, in every state lying east of the Rockies, and its business is not confined to a single geographical territory. The finished products are of a kind that is highly competitive in price throughout the entire country. The company exists for the purpose of making its profit from the manufacture and sale of its products. The transportation of the finished product to dealers throughout the United States and the transportation of the raw materials from their source to the factory at Guthrie are purely incidental to the manufacturing process. The company maintains no warehouses anywhere, but delivers direct to its dealers.

From the beginning this company has not used common carriers either for the delivery of the finished product or the transportation of raw materials, except in isolated instances usually related to deliveries on the West Coast beyond the Rockies or where the raw materials can be shipped to the factory in Guthrie in carload lots. The reason for this is two-fold.

First and foremost is the fact that the equipment available to common carriers is not designed to handle economically the type of finished product manufactured by this company. The furniture is bulky and large in size, but light in weight. So far as is known to this company, there is no common carrier maintaining special equipment designed to carry this type of finished product only. The most eco-

nomical type of transportation is by a specially designed trailer, the configuration of which is adapted especially to bulky furniture, which trailers are manufactured for the company by Fruehauf Trailer Company. There is no special requirement for the tractors which draw these trailers, other than the horse power required to pull economically a trailer of its weight and size when fully loaded.

The *second primary reason* for not using common carriers lies in the fact that the common carrier operates over a designated route and is not permitted to deviate from that route. If the company's dealer does not lie upon the common carrier's route, then the shipment must be transferred to another common carrier or to a local freight or truck line, resulting in excessive handling and excessive delay. Where shipment by local freight or truck line is necessary, additional packing is required by law, and additional charges are made by the company. These charges vary, depending upon the item. The packing charges thus incurred are listed separately, and the cost of the merchandise to the dealer is increased by that amount. It is not absorbed by the company. In transportation upon its own equipment this additional packing is not necessary, and these charges are not made, resulting in a lower delivery price to the customer.

Because of the difficulties involved in packaging and the uneconomical and excessive handling and delay incurred in the use of common carriers, it has always been the policy of this company to make its own deliveries direct to its dealers. Whenever practical, and it is practical in most instances, the company equipment is likewise used to return raw materials from their sources to the factory in Guthrie. These raw materials consist of steel, wood parts, upholstery parts and materials, cotton for mattresses, and mirrors.

With the exception of local deliveries in Oklahoma, all transportation performed by the company of its finished product, as well as the return of raw materials, is interstate transportation. With regard to its operations in Arkansas, the transportation performed by the company consists of deliveries to dealers in Arkansas from the factory at Guthrie or passage through Arkansas to dealers in other states from the factory in Guthrie.

Prior to 1952 the company operated its own trucks or tractors pulling these specially built trailers. In regard to the prior rate of pay of the drivers, the company at one time had a schedule of 4½¢ per mile and 5½¢ per mile for backhauls. The drivers were paid an additional sum on backhauls because a truck on a backhaul would be on the road longer for the reason that a loaded truck could not make as much time as an unloaded truck; and in addition the driver spends time for which he must be compensated in loading the trailer for the backhaul. However, upon the last contract in effect before the present lease arrangements, this rate of pay had been changed to 5½¢ per mile both ways, plus $5.00 for any pickup on return trip. Under the company's original contract a pickup of return merchandise was not classed as a backhaul.

In 1951 the company suspected that it was being defrauded by its drivers. These drivers had been furnished gasoline credit cards for the purpose of charging truck expense on the road. The company hired detectives and conducted an investigation and found that of thirteen drivers, twelve were defrauding the company by padding gasoline tickets. For example, a man would actually buy 80 gallons of regular gas, but would obtain a ticket charging the company with 100 gallons of ethyl gasoline, getting the difference in cash. The company placed a checker on each truck with the regular driver and had each driver make a series of normal runs and then compared the gasoline mile-

age on those runs with the driver's prior mileage. The company also included backhauls, the proportion of backhauls being probably in excess of the normal proportion. The gasoline mileage on these check runs increased about 40%. The company computed its loss over a three-year period at approximately $27,000 and recovered substantially all this amount from various filling stations and from the bonding company. This investigation disclosed in addition to the padding of gasoline tickets, that gasoline was being placed in the employees' own personal cars; that repairs on employees' own personal cars were being charged to the company; and that cartons of cigarettes were being charged out to the company as ten gallons of gasoline for each carton.

After this investigation the company obtained signed confessions from all drivers except the one who was cleared. These drivers were refused coverage under the company's bond, and it was necessary to terminate their employment. The company carried at that time a blanket $100,000 bond on all employees. The company offered to retain these drivers if the bonding company would reinstate them or if each driver could make a $25,000 bond himself, the company to pay the cost of the bond. These arrangements were not made, and the company was charged with an unfair labor practice before the National Labor Relations Board. A strike and extensive labor hearings ensued, which were dismissed by the National Labor Relations Board on the finding that the company had committed no violation.

In September of 1952 the company determined to change its delivery operations to a system whereby the driver would own and maintain his own truck, which would be leased to the company with the driver being paid upon a mileage basis with an adjustment for backhauls. In carrying out this purpose a lease was prepared by Walter D. Hanson, the company's attorney, to be signed by each

driver. The first lease permitted the owner of the truck to lease the truck to other concerns when it was not in use by the Oklahoma Furniture Manufacturing Company. Mr. Hanson discussed this lease at length with the district supervisor of the Interstate Commerce Commission in Oklahoma City, Chester F. Haneley. He was with the ICC from March, 1942, until November 30, 1955. Mr. Haneley raised objections to this provision of the lease, stating that the purpose of the ICC was to protect the public and that the ICC would prefer that the truck be at all times under the control of the Oklahoma Furniture Manufacturing Company. He specifically objected to the permissive leasing of the truck to other concerns, because that would require a constant check by the ICC to determine if any other agreements were made.

To meet Mr. Haneley's objections the lease was changed, and after various conferences with Mr. Haneley the present form of lease was drawn. Under this lease the company furnishes the trailer, and the driver furnishes his own tractor. The company carries no cargo insurance upon its products, and the driver is not liable for any loss to the products except for gross negligence or larceny, embezzlement, or conversion. The driver is liable for theft, conversion or embezzlement of the trailer and up to $250 damage to the trailer. The trailer has a value greatly in excess of $250. The figure of $250 was placed in the lease to insure more careful handling of the trailer by the driver.

The primary motive in changing its delivery operations to the lease agreement was to reduce the expense of repairs and accidents to the vehicles and to the public on the highways and to eliminate the fraudulent ticket padding which had previously gone on. There would be no incentive for a driver to pad a gasoline ticket which he himself had to pay. The company's experience in the repair of its

trucks had indicated that there were many minor repairs on the trucks which were being performed in garages at high prices and that many of the repairs were actually made necessary because of poor maintenance. It was the company's thought in changing to the lease agreement that the man operating his own truck in which he had a financial interest would operate it more carefully, would be more careful about the cost of repairs and more careful in the maintenance of the truck to eliminate unnecessary wear on the truck.

Sufficient time has elapsed to verify the accuracy of the company's thinking in this regard. The company's fiscal year ends on May 31, and its insurance contracts run from June 1 to June 1 of each year. For the year ending June 1, 1953, the insurance loss experience on the company's operations, which were at that time largely with its own trucks, was 388%. For the year ending June 1, 1954, this had been decreased to 138%. For the year ending June 1, 1955, at which time the company was operating all of its long-haul equipment under driver-lease arrangements, the loss experience was decreased to 29%.

In September of 1952 the company entered into lease agreements with two drivers, who are still operating under this arrangement. Gradually the company converted its entire long-haul operations to this arrangement; and its efficiency in deliveries has been increased, and damage to its merchandise in transit has been substantially reduced, together with the reduction in its insurance loss experience shown above. All of these factors taken together constitute an intangible which cannot be measured by any percentage factor, but the company's experience is definitely to the effect that this arrangement is far more advantageous both to the company and to its customers.

As of the present time the company has 12 drivers operating under this arrangement.

Under the present lease, drivers are paid 14¢ or 15¢ per mile, depending upon the type of trailer they are hauling, and 19¢ and 20¢ per mile for backhauls. The company's fiscal year ends May 31. For the fiscal year ending May 31, 1955, the trucks owned by lease-drivers operated 852,322 miles, exclusive of backhauls, and 339,631 miles of backhaul, or a total of 1,191,953 miles. This mileage was in practically all of the states east of the Rockies.

In the fiscal year ending May 31, 1952, at the time when the truck operations were entirely with the company's own equipment, the company's cost per truck mile was 20.04¢. For the fiscal year ending May 31, 1955, although many items of truck operation have increased in price, the cost per mile of the driver-owned trucks was reduced to 15.37¢. This also has reduced the company's overall cost of operation, resulting in a better price to the ultimate consumer. The cost per mile of the two company-owned trucks for the fiscal year ending May 31, 1955, was 60.08¢.

The company's merchandise is priced to dealers at a base price plus a delivery charge. The cost of delivery is not priced separately to the dealer, but the price to him is a delivery price. This delivery charge is set up by the company according to zones.

Another factor in the company's economical delivery is the fact that the driver leaving the factory normally has merchandise consigned to several dealers. The truck is loaded so that these deliveries can be made in sequence to the door of the dealer, eliminating unnecessary handling of the merchandise and the packaging and separate billing involved in shipments by common carrier and making a definite saving in time. In eliminating the excessive handling of the merchandise involved in extra loading and unloading, as would be required in the use of common carriers, the company has also substantially eliminated damage to the merchandise.

Keeping in mind the aim of the Interstate Commerce Commission to furnish adequate protection to the public, the company broadened its insurance coverage at the inception of these lease arrangements. Each driver is a named insured upon the company's public liability policy, and each piece of equipment, whether it be the driver's tractor or the company's trailer, is specifically listed on the policy. Under the former arrangement, if the equipment was not being used in the company's business, there was no insurance coverage. The company determined in the course of its investigation in 1951 that on numerous occasions the drivers would detach the trailer from the truck and use the truck for private purposes. Under such conditions there would be no insurance coverage on that truck, and in the event of an accident the public would be without protection. Under the present arrangement the truck and the driver are fully insured at all times. This was one of the changes in the company's method of operation which was particularly approved by the representative of the Interstate Commerce Commission, because it would give greater protection to the public than the prior operation.

The drivers are required to adhere strictly to ICC regulations on driving, speed, hours at work and safety equipment. A log is maintained and turned in to the company regularly by each driver.

The company retains complete control over the designation of the trip to be made by the driver at any time. This includes not only the delivery of merchandise, but, if necessary, the return haul is designated by the company. This control is complete and absolute in every sense, not only of the driver and his actions, but of his equipment and the route over which it is to be operated and of the load which is to be carried. The company determines entirely the nature of the merchandise carried; and the rental paid the driver for his leased equipment is not dependent at all

upon the type, quantity or make of the merchandise carried. The control exercised by the company over its twelve lease-drivers is identical with that which it exercises over its two employee-drivers who operate company-owned equipment.

No passengers are carried on the leased equipment at any time. There is not now and never has been a single instance when the equipment of the plaintiff company was used to haul merchandise or raw materials for any person or firm other than itself. The company does not now and has not at any time in the past permitted any exception to this rule. The only materials or merchandise carried in the company's equipment are materials and merchandise belonging to the company and being transported in the normal course of its business.

The company's arrangements with the driver-owners are not in any sense a subterfuge, but are *bona fide* arrangements made in the interest of economical operation of the company's business. The use of common carriers for the transportation of the company's finished products is not feasible because of the bulk of its products and the fact that no common carrier has equipment capable of handling these products on an economical basis. The use of the equipment for backhaul of raw materials results in a substantial saving to the company over the customary rates which would be charged by common carriers. This saving is passed on to the customer in the form of lower prices, placing the company in a more favorable competitive position.

Petitioner, Woodard, is now and at the time of his arrest on May 16, 1955, was the owner of the tractor which he was driving. This tractor was under lease to the company. He was driving through Arkansas from Grenada, Mississippi, on a backhaul of raw material for the company's factory, making an interstate delivery. He did not on that trip haul, nor has he on any other trip hauled, any

merchandise or materials belonging to any person other than the employing company. He was under the control and direction of the company on that trip and has been on all prior and subsequent trips. Furthermore he had formerly been an employee-driver of a company tractor before the lease agreements went into effect. He testified that the company maintains the same complete control over his operations under the lease as exercised when, as an employee, he operated a company-owned tractor.

ARGUMENT

The Federal constitutional question is this: Is it not an undue burden on interstate commerce to require a lessor-employee to obtain a State permit as a contract carrier when his lessor-employer is a private carrier by Federal law? To put it another way, may a State statute arbitrarily convert private carriage by Federal law into contract carriage by State law?

Let us now consider the case as it progressed up to this Court. Trial was had in the Chancery Court of Pulaski County, where the Court held that the Petitioner-Company was a private carrier under the Arkansas statute. The Chancellor specifically found that:

1. So far as Arkansas is concerned, the Company's transportation is wholly in interstate commerce;
2. The transportation of the Company's products is incidental to and in furtherance of the Company's manufacturing operations;
3. The leases were made in good faith and were not a sham to evade State regulation;
4. Woodard, lessor, driver-owner, at the time of his arrest was not performing transportation service and was, therefore, not a contract carrier; and
5. The Company exercised full and complete control over his operations.

On appeal to the Supreme Court of Arkansas that Court disregarded these specific findings and held as a matter of law under the State statute that by the terms of the lease, the Company was a contract carrier. That Court followed *Public Service Commission* v. *Lloyd A. Fry Roofing Co.*, 219 Ark. 553; 244 S. W. (2) 147. The facts in the *Fry* case were somewhat similar; and in determining whether

Fry was a private carrier in its interstate operations, the Arkansas Supreme Court concluded that the "lease was not *bona fide*" but "only a clever scheme to circumvent the letter and spirit of the law." In reaching this conclusion the Court cited *Georgia Truck System* v. *ICC*, 123 Fed. (2) 210; *ICC* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13; *U. S.* v. *La Tuff Transfer Service*, 95 F. Supp. 375. These cases set out the Federal requirements good faith in making the lease and the operations thereunder and inquire whether a transportation service is being rendered rather than a *bona fide* lease. The Arkansas court looked "to the status of the driver-owner and to the nature of the service rendered by them."

The *Fry* case was reviewed by this Court on *certiorari* and affirmed by a 5 to 4 decision in *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U. S. 157; 97 L. Ed. 168; 73 S. Ct. 204. This Court held that:

1) The findings of the Arkansas Supreme Court that the lease agreement was a sham is not without factual foundation;

2) A contract carrier can be required to obtain an Arkansas permit;

3) The Arkansas Public Service Commission is not authorized to deny a permit for interstate carriage on State highways because of the adequacy of other services; and

4) The mere requirement that interstate contract carriers obtain a permit is not an undue burden on interstate commerce.

With respect to the first item, this Court said:

"There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's findings; they are not without factual foundation, and we accept them.

> "The finding that the arrested drivers own and operate the trucks for hire makes them contract carriers as defined in the State act."

Thus the *Fry* case rested on the Arkansas court's finding that the lease was a sham and the acceptance of those findings by this Court as being "not without factual foundation." *The carrier's status turned on a question of fact, and in determining that question the Supreme Court of Arkansas applied the Federal tests laid down in the Federal Cases.*

In the present case the Supreme Court of Arkansas brushed aside the Chancellor's findings, which were based on good faith, primary business, control over the vehicle and the fact that Woodard was not performing a transportation service, which were the Federal tests. Then, the Supreme Court of Arkansas held as a matter of law that under the lease, Petitioner-Woodard became a contract carrier. Thus, may a State court ignore what by Federal law is a question of fact and apply a State statute in determining the status of a carrier in interstate commerce? Can a State statute convert a question of fact under Federal law into a matter of law with respect to a carrier's status? What law—State or Federal—controls in determining a carrier's status in interstate commerce? That is the question here.

We call attention *Lloyd A. Fry Roofing Co.* v. *Michigan Public Service Commission*, 338 Mich. 544; 61 N. W. (2) 783, where under a similar lease the Michigan court found that Fry was a private carrier. Thus, in Michigan, Fry is a private carrier, while in Arkansas Fry's lessor-employee is a contract carrier. This is merely one example of the possible confusion which may arise among the states until this Court finally resolves the matter. It is definitely in the public interest for this Court to decide whether the Federal tests should be uniformly applied by the states in

determining a carrier's status in interstate commerce. Every private carrier handling its own merchandise in interstate commerce by similar lease agreement will be directly affected by the decision.

PETITIONER-COMPANY IS A PRIVATE CARRIER BY FEDERAL LAW

The definition of a private carrier under the Federal Motor Carrier Act is as follows:

> "The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." 49 USCA, § 303 (17).

A private carrier is not required to obtain a permit under Federal law. Such carrier is subject to reasonable regulation with reference to the qualifications and maximum hours of service of employees and standards of equipment.

In determining whether or not the company is a private carrier under Federal law, the following rules govern:

> (1) "If a person, in good faith, transports his own property for the purpose of sale or in furtherance of his own commercial enterprise, he is a 'private carrier' and is not subject to the Motor Carrier Act." 49 USCA, § 303 (a) (17); *ICC* v. *Tank Car Oil Corp.*, 151 Fed. (2) 834.

> (2) "If it is established that the primary business of a concern is the manufacture or sale of goods which the concern transports itself in furtherance of

its primary business, and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business is private carriage, even though a charge for transportation is included in the selling price and is added thereto as a separate item, and the concern is a 'private carrier' of property by motor vehicle within the meaning of the Interstate Commerce Act rather than 'common carrier' or 'contract carrier'." *Brooks Transp. Co.* v. *U. S.*, 93 Fed. Supp. 517; affirmed 340 U. S. 925; 95 L. Ed. 668; 71 S. Ct. 501.

(3) "In order for the operations to be those of the shipper as a private carrier, there must be a clear and unequivocal showing that the shipper exercises control and responsibility over the operations of the vehicle, such as would be exercised by it if it were the owner of the vehicle." *ICC* v. *F. & F. Truck Leasing Co.* (1948), 78 Fed. Supp. 13, 20.

We call your attention to *Watson Mfg. Co., Inc., Common Carrier Application,* 51 Motor Carrier Cases 223, wherein the ICC held that the shipper under a similar lease agreement was a private carrier. This Court has said that in matters of transportation the opinions of the ICC are entitled to great weight, *U. S.* v. *American Trucking Association,* 310 U. S. 534; 84 L. Ed. 1345; 60 S. Ct. 1059, *Levinson* v. *Specter Motor Co.,* 330 U. S. 649; 91 L. Ed. 1158; 67 S. Ct. 931.

Thus, the above Federal decisions consider the petitioner's primary business, whether a transportation service was being performed, and whether a *bona fide* employer-employee relationship existed between the company and the drivers under the lease.

In its decision the Supreme Court of Arkansas relied primarily on the following sections of the Arkansas Motor Carrier Act of 1955.

§ 5 (a) (8) "The term 'contract carrier by motor vehicle' means any person not a common carrier included under Paragraph 7, Section 5 (a) (this section) of this Act who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights, or any other arrangements, transports passengers or property by motor vehicle for compensation."

§ 5 (a) (9) "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." Section 5 (a) (d) of Act 397 of 1955 gives this definition of the term "motor carrier": "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle, and any person performing for hire transportation service without authority from the commission."

§ 22 (b) "Any person who by lease or otherwise permits the use of a motor vehicle or vehicles by other than a carrier holding authority from this Commission, and who furnishes in connection therewith a driver or drivers, either directly or indirectly, or in any manner whatsoever exercises any control, or assumes any responsibility over the operation of such vehicle or vehicles, during the period of such lease or other device, shall be deemed a motor carrier."

The Court said:

"The principal question for decision then is whether Woodard (and others bearing the same relationship to the Manufacturing Company) is a 'contract carrier' (or a 'motor carrier'), it being conceded that Woodard is not a common carrier. The answer to this question depends upon the correct interpretation of the relationship that existed between Woodard and the

Manufacturing Company under the provisions of the lease agreement which we now consider . . .

"Appellee, Oklahoma Furniture Manufacturing Company, earnestly insisted that it is a private carrier and that Woodard is merely its employee, and that, therefore neither had to secure a certificate of necessity and convenience or a permit from the Arkansas Public Service Commission. It further insists that the lease agreement is *bona fide* and not a ruse to evade the Commission's regulations. We concede that the Company used no bad faith in making the arrangements it did, but that is not the decisive issue. Sure, there is nothing illegal or wrong in the lease agreement *per se*. The vital question for decision is: Do the terms of the lease agreement prevent Woodard from being a 'contract carrier' under the statutes and the facts in this case? This question, we think, must be answered in the negative."

Thus, the Supreme Court of Arkansas ignored the Federal tests of primary business, of good faith and whether a transportation service was being rendered; and that Court specifically held that because of the lease agreement Petitioner-Woodard's status was that of a contract carrier under the Arkansas statute. We contend that this is error, because the entire operations were interstate commerce wherein by Federal law the Petitioner-Company is a private carrier. It is our contention that the State statute cannot convert private carriage under the Federal statute and Federal decisions into contract carriage by State law. We argue that the Supreme Court of Arkansas should have applied the Federal tests in determining the nature of the carriage.

Congress has pre-empted the field by the Federal Motor Carrier Act and has defined a *private carrier*. In determining whether carriage in interstate commerce is priv-

ate, the Federal courts have applied the above tests in dealing with lease agreements. Also the ICC has passed on the precise point in the *Watson Mfg. Co.* case, *supra*. Thus, we earnestly contend that the Federal Motor Carrier Act, as construed by the Federal courts and applied by the ICC, must prevail as the supreme law of the land in matters of interstate commerce. U. S. Constitution, Art. VI, Sec. (2). Therefore, the decision of the Supreme Court of Arkansas should be reversed because it applied the State statute instead of following the Federal Motor Carrier Act as construed by the Federal decisions. Obviously, the Petitioner-Company cannot be a private carrier by Federal law, while at the same time Petitioner-Woodard, its employee, is a contract carrier under a State statute. The carrier's status must be determined by Federal law alone to insure uniformity in interstate commerce. This is a matter of great importance to the operation of the entire trucking industry, and this Court alone can correct the obvious inconsistency created by the decision of the Supreme Court of Arkansas.

CONCLUSION

In view of the above, we respectfully petition this Court to grant *certiorari* to the Supreme Court of Arkansas to clear up once and for all this apparent conflict in the carrier's status. It is a matter of vital importance both to State regulatory bodies and to the trucking industry.

Respectfully submitted,

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APPENDIX

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

A. D. WOODARD AND OKLAHOMA FURNITURE MANUFACTURING COMPANY ..... *Plaintiffs,*

v. No. 102,577

LEWIS M. ROBINSON, WILLIAM M. BERRY AND JAMES MALONE, COMPOSING THE ARKANSAS PUBLIC SERVICE COMMISSION ..... *Defendants.*

RESTRAINING ORDER

On this date is presented to the court verified complaint herein, seeking a temporary restraining order, and the court, being well and sufficiently advised, doth find that said restraining order should issue upon filing herein by the plaintiffs of a good and sufficient bond in the sum of $1,000, to be approved by the clerk of this court.

IT IS, THEREFORE, BY THE COURT ORDERED that the defendants and their agents and employees be and they are hereby restrained and enjoined, pending the further orders of this court, from interfering with or hindering in any manner the plaintiffs or their agents and employees and lessor drivers in the transportation of property of the plaintiff, Oklahoma Furniture Manufacturing Company, by motor vehicle in interstate commerce in Arkansas, as described in lease agreement marked Exhibit "A" to the complaint.

IT IS FURTHER ORDERED that the defendants be and they are hereby restrained from instituting and prosecuting any criminal action against the plaintiffs, their agents, employees and lessor drivers, arising out of the operation of the leased motor vehicle equipment herein

described, while being operated in the transportation of property of the plaintiff Company in interstate commerce, pending the further orders of this court.

(S) RODNEY PARHAM,
Chancellor.

May 27, 1955.

IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS

A. D. WOODARD AND OKLAHOMA FURNITURE MANUFACTURING COMPANY ..... *Plaintiffs,*

v. No. 102,577

LEWIS M. ROBINSON, WILLIAM M. BERRY AND JAMES MALONE, COMPOSING THE ARKANSAS PUBLIC SERVICE COMMISSION ..... *Defendants.*

DECREE

On this day, April 17, 1956, this cause coming on to be heard, the plaintiffs appearing by McMillen, Teague & Coates, of Little Rock, Arkansas, and by Hanson & Green, of Oklahoma City, Oklahoma, their attorneys, and the defendants, Lewis M. Robinson, William M. Berry and James Malone, members of the Arkansas Public Service Commission, appearing by John R. Thompson, their attorney; and the cause was submitted to the Court upon the pleadings, a deposition, evidence introduced in open court, the briefs and argument of counsel; and being well and sufficiently advised, the Court finds:

That the plaintiff company is a Delaware corporation with its principal place of business in Guthrie, Oklahoma, where it manufactures a line of low-priced furniture very

highly competitive in price throughout the entire nation; that from its plant at Guthrie it distributes its merchandise into a number of states, including points in Arkansas; that save in few instances since its organization the company has not used common carriers for the delivery of the merchandise or for the procurement of raw materials, because such common carriers are not designed to handle economically the finished product made by the company; that the most economical type of transportation is by a specially designed trailer particularly adapted to bulky but light furniture; that prior to 1952 the company operated its own trucks or tractors pulling specially built trailers, also owned by the company; that in 1952 the company determined to change its methods of delivery by a lease agreement which was prepared by the company's attorney after consultations with a representative of the Interstate Commerce Commission in Oklahoma City; that the lease involved in this cause was prepared pursuant to these conferences following the approval of the ICC representative; that the company has 12 drivers who own their tractors and lease same to the company; that said tractors pull company-owned trailers only; that the change in method from company-owned equipment to leased tractors pulling company-owned trailers has resulted in economy in operating costs and has improved the efficiency in the delivery of raw materials; that on return trips or backhauls the trailers transport raw materials from various states to the factory at Guthrie where said raw materials are used in the manufacture of the furniture; that thus by the present operation there is a 2-way traffic—outbound for delivery to customers and inbound from sources of raw material to the factory.

The Court further finds that so far as the State of Arkansas is concerned, all of the company's transportation is in interstate commerce; that the outbound transportation of the company's products and the inbound carriage of raw

materials is incidental to and in furtherance of the company's primary manufacturing business; that the lease agreements made with the driver-owners are made in good faith and are not a sham or a subterfuge to evade regulation by the defendant Commission; that the company has transported only its own products and never those of another; and thus the Court finds that the company is a private and not a contract carrier and therefore is not subject to regulation as a contract carrier by the defendant Commission.

The Court further finds that the plaintiff, Woodard, lessor-owner of the truck which he was operating at the time of his arrest in West Memphis on May 16, 1955, was not a contract carrier or a person performing for-hire transportation service; that the plaintiff company exercised full and complete control over his operations in the same manner as the company would have exercised if he had been an employee; and that his lease to the company of the tractor which he was operating at the time of his arrest, was *bona fide* and not a clever scheme to evade regulation by the defendant Commission.

The Court further finds that defendants' construction of Section 22 (b) of Act 397 of 1955 as applied to the operations of the plaintiffs in this cause under the facts as found by the Court in this cause is rejected, because such construction would constitute a violation of the due process clause of both the federal and state constitutions, would place an undue burden on interstate commerce and would conflict with the provisions of the Interstate Commerce Act, 49 USCA, Sec. 301 ff. governing interstate commerce.

THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the status of the plaintiff company be, and it hereby is declared and adjudged to be that of a *bona fide* private carrier, and in such capacity it is not subject to regulation by defendant Com-

mission as a contract carrier; that the relationship between plaintiff Woodard and plaintiff company is not that of contract carrier; that plaintiff Woodard is not conducting a "for-hire transportation service" under Act 397 of 1955 under his lease with the plaintiff company.

IT IS FURTHER ORDERED that the defendants, their agents and employees be, and they hereby are, permanently enjoined of and from interfering in any way with either plaintiffs or any other lessor-drivers under similar leases with the company in the transportation of the company's merchandise in interstate commerce through Arkansas; that the defendants, their agents and representatives be, and they hereby are, restrained from prosecuting further at West Memphis, Arkansas, the case there pending against the plaintiff Woodard, and they are further restrained from instigating further criminal prosecution against plaintiff Woodard or other lessor-drivers holding similar leases from the plaintiff company.

IT IS FURTHER ORDERED AND ADJUDGED that the National Surety Company of New York, surety on the bond posted by plaintiffs herein in obtaining the temporary injunction in this case, be, and it hereby is, released and discharged of and from all liability under said bond; to which findings and judgment herein defendants except and pray an appeal to the Supreme Court of Arkansas, which appeal is hereby granted.

(S) Sam Robex,
Chancellor.

SUPREME COURT OF ARKANSAS

LEWIS M. ROBINSON, WILLIAM M. BERRY AND JAMES MALONE, COMPOSING THE ARKANSAS PUBLIC SERVICE COMMISSION ..... *Appellants,*

v. No. 1093

A. D. WOODARD AND OKLAHOMA FURNITURE MANUFACTURING COMPANY ..... *Appellees.*

Opinion delivered December 10, 1956.

Rehearing denied January 7, 1957.

Appeal from Pulaski Chancery Court. Reversed.

PAUL WARD, Associate Justice.

Appellee, Oklahoma Furniture Manufacturing Company, a corporation, located at Guthrie, Oklahoma, is engaged in manufacturing furniture. This furniture is sold, and shipped by trucks, to retail dealers in a large number of states. On return trips to Guthrie the trucks carry raw materials to be used by the Company in the manufacturing process. For the purposes of this opinion we will assume (what appears to be a fact) that the furniture is carried in a large trailer-truck which is pulled by a detachable truck-tractor.

The owner and driver of one of these tractors was appellee, A. D. Woodard. On May 16, 1955, while on his way from Grenada, Mississippi, to Guthrie, Oklahoma, with a trailer load of merchandise belonging to appellee Company, Woodard was arrested in West Memphis, Arkansas, by enforcement officers of appellants. When first accosted by the officers Woodard exhibited an "equipment lease agreement" between himself and the company (to be later discussed), and after examining the same the enforcement officers arrested him for violation of Act 397 of 1955 because neither of the appellees held a permit or a certificate of

convenience and necessity from the Arkansas Public Service Commission. By agreement this criminal case was continued indefinitely.

The Manufacturing Company had the same kind of lease agreement with others that it had with Woodard, and when said enforcement officers threatened to continue to arrest the operators of similar trucks (meaning tractors and trailers) carrying merchandise under the same circumstances above mentioned, appellees, on May 27, 1955, filed their complaint in the Chancery Court of Pulaski County asking for a declaratory judgment and for a restraining order against appellants. After a hearing on April 17, 1956, the chancery court entered a decree in favor of appellees, finding that the appellant furniture Company was a *bona fide* private carrier and that appellee Woodard was not a "motor carrier" (or contract carrier) under Act 397 of 1955.

On appeal from the above decree appellants base their contention for a reversal on two grounds, to-wit: 1. The appellee, Woodard, is operating as a motor carrier in violation of Acts 367 of 1941 and 397 of 1955, and; 2. Act 397 of 1955 does not unduly burden interstate commerce and does not invade a field of regulation preempted by the Federal Motor Carrier Act.

1. We agree with appellants that Woodard was, under the facts and circumstances of this case, operating as a motor carrier (which includes a "contract carrier") in violation of the acts mentioned above. Section 5 (a) (8) of Act 367 of 1941, Section 5 (a) (8) of Act 397 of 1955 and Ark. Stats. § 73-1758 (a) (8) are exactly the same and read as follows:

> "The term 'contract carrier by motor vehicle' means any person not a common carrier included under Paragraph 7, Section 5 (a) [this section] of this

> Act who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights, or any other arrangements, transports passengers or property by motor vehicle for compensation."

Section 5 (a) (9) of said Act 367 defines motor carrier in these words: "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." Section 5 (a) (d) of Act 397 of 1955 gives this definition of the term "motor carrier": "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle, and any person performing for hire transportation service without authority from the commission." Section 22 (b) of Act 397 of 1955 [Ark. Stats. § 73-1775 (b)] further defines a "motor carrier" as follows:

> "Any person who by lease or otherwise permits the use of a motor vehicle or vehicles by other than a carrier holding authority from this Commission, and who furnishes in connection therewith a driver or drivers, either directly or indirectly, or in any manner whatsoever exercises any control, or assumes any responsibility over the operation of such vehicle or vehicles, during the period of such lease or other device, shall be deemed a motor carrier."

Section 5 (a) (14) [Ark. Stats. § 73-1758 (a) (14)] defines a "private carrier" as any person engaged in transportation by motor vehicle upon public highways, of persons or property, or both, *but not as a common carrier or a contract carrier.* Ark. Stats. § 73-1764 provides that no person shall engage in the business of a contract carrier over any of the public highways of this state unless he has a permit issued by the commission, and appellees have stipulated that no such certificate has been issued to Woodard, or other drivers.

The principal question for decision then is whether Woodard [and others bearing the same relationship to the Manufacturing Company] is a "contract carrier" [or a "motor carrier"], it being conceded that Woodard is not a common carrier. The answer to this question depends upon the correct interpretation of the relationship that existed between Woodard and the Manufacturing Company under the provisions of the lease agreement which we now consider.

For some years prior to January 24, 1955, the furniture company made its deliveries in equipment owned by it and driven by their own employees, but this proved unsatisfactory and so on the date mentioned an "equipment lease agreement" was entered into between the Manufacturing Company as lessee and Woodard as lessor—being the same agreement used thereafter with other drivers. Among other things this agreement states; the lessor is the owner of certain motor vehicle equipment [which we understand to be a truck-tractor] which the company hereby leases; the consideration going to the lessor is based on 14 cents, 15 cents per mile, depending on certain circumstances therein mentioned; lessor is bound to keep a mileage report which the company may audit and correct in favor of either party in event that it does not conform to the highway mileage; the truck-tractor is to be operated only by the lessor, or, in event of illness or disability by someone selected by the lessor and approved by the Company; the lessor is obligated to pay all operation costs including the cost of gasoline, oil, grease, repairs, maintenance, antifreeze and such other costs as may be incident to the operation and maintenance of said equipment; the lessor is obligated to keep his equipment in first class operating condition, and must keep the equipment clean and washed with sufficient frequency, and if lessor fails to comply the Company has the right to cancel the agreement; the Company

has the right to direct the use of the leased equipment in connection with its business and to designate the trips and routes; the Company is not liable to lessor for wear, tear, and depreciation on the leased equipment, and will not be liable for any damage caused to the equipment by accident, theft or fire, etc.; the Company has the right, at its discretion, to take out insurance covering the property transported by said leased equipment, but the Company is not obligated to carry collision, fire, theft or any other type of insurance for the account of the lessor, and if the lessor carries insurance it shall be at his sole cost; the lessor at his own expense must procure Oklahoma Commission license plates to be used on said equipment; if the lessor only furnishes a tractor and uses a company trailer he is liable to the extent of $250 for any damage, other than wear and depreciation, occurring to the trailer and; either party shall have the right to cancel the lease agreement for any reason upon giving 30 days' written notice to the other party.

Appellee, Oklahoma Furniture Manufacturing Company, earnestly insisted that it is a private carrier and that Woodard is merely its employee; and that, therefore neither had to secure a certificate of necessity and convenience or a permit from the Arkansas Public Service Commission. It further insists that the lease agreement is *bona fide* and not a ruse to evade the Commission's regulations. We concede that the Company used no bad faith in making the arrangements it did, but that is not the decisive issue. Sure, there is nothing illegal or wrong in the lease agreement *per se*. The vital question for decision is: Do the terms of the lease agreement prevent Woodard from being a "contract carrier" under the statutes and the facts in this case? This question, we think, must be answered in the negative.

In the case of *Public Service Commission* v. *Lloyd A. Fry Roofing Company*, 219 Ark. 353, 244 S. W. 2d 147, where, under facts that cannot be materially distinguished

from the facts here, we hold against appellees' contention. In the cited case J. R. Boshers occupied essentially the same status, under a lease agreement, that Woodard does here, and we held that Boshers was a contract carrier. The statute defining a "contract carrier" was the same when the *Fry* case was decided in 1951 as it is now, except that *evasion* has been made more difficult by the passage of Section 22 (b) of Act 397 of 1955 above copied.

In view of the *Fry* decision, *supra,* we deem it necessary here only to call attention to the material portions of the lease agreement to the ones in this case. There: Boshers owned the truck-tractor and leased it to Whittington who in turn leased it to the Fry Roofing Company; Boshers was to furnish gas, tires and other up-keep of the tractor; the lease agreement could be cancelled, by either party, merely by written notice (2 days) to the other; and, Boshers had to drive his own tractor. The reasons, and the supporting decisions, given in the *Fry* case are equally applicable to this case, and it would serve no useful purpose to repeat them here. We conclude that Woodard was a "contract carrier" and therefore is required to secure a permit from appellants.

2. Likewise, the decision in the *Fry* case, as affirmed by the United States Supreme Court, compels us to hold the regulatory acts sought to be enforced against Woodard [and other drivers similarly situated] are not a burden on interstate commerce.

The opinion in the *Fry* case on appeal to the United States Supreme Court, 344 U. S. 157, 97 L. Ed. 168, on this point said: "The finding that the arrested drivers own and operate their trucks for hire makes them contract carriers as defined in the State Act. The state asserts no power or purpose to require the drivers to do more than register where that carriage is in interstate commerce." Then, after noting that State and Federal authorities were obli-

gated to cooperate on matters relating to interstate commerce, the court further said: "In this situation our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce, and that a mere requirement for a permit is not such a burden."

Since there is nothing in the record before us to show that the Arkansas Public Service Commission has attempted or will attempt to impose any burdensome conditions to the granting of a permit to Woodard, we are bound to agree with appellants' view.

We are not convinced by appellees' argument that Section 22 (b) of Act 397 of 1955 is unconstitutional. They make this argument with the proviso that said section has the effect of changing the Company's status as a private carrier. The answer to this argument is; the equipment lease agreement and not Section 22 (b) effected the change in the Company's status. Having already concluded that Woodard is a contract carrier forecloses the possibility of the Company being a private carrier of the same merchandise.

Reversed.

Mr. Justice SMITH dissents.

IN THE SUPREME COURT OF ARKANSAS

LEWIS M. ROBINSON, et al. ..... *Appellants,*

v. No. 1093

A. D. WOODARD AND OKLAHOMA FURNITURE MANUFACTURING COMPANY ..... *Appellees.*

PETITION FOR REHEARING

Appellees pray for rehearing because the Court erred in holding that 1) appellee Woodard, the lessor-driver-em-

ployee, was a contract carrier; and 2) requiring him to obtain an Arkansas permit as a contract carrier was not an undue burden on interstate commerce.

WHEREFORE, appellees pray for a rehearing and that the judgment of the lower court be affirmed.

Respectfully submitted,

HANSON & GREEN,
McMILLEN, TEAGUE & COATES,
Attorneys for Appellees.

John E. Coates, an attorney for appellees, certifies that he believes there is merit in the above petition and that it is not filed for the purpose of delay.

(s) JOHN E. COATES.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE 1, Section 8:

"The Congress shall have power . . .

"[3] To regulate commerce with foreign nations, and among the several states and with the Indian tribes; . . ."

ARTICLE 6, Section 2:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

STATUTORY PROVISIONS INVOLVED

A. Federal Legislation

Pertinent portions of statutes involves:

Part II, Interstate Commerce Act (Federal Motor Carrier Act) 49 U.S.C.A.:

"Section 303. (a) As used in this part—(15) the term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein [common carrier transportation] by motor vehicle of passengers or property, in interstate or foreign commerce for compensation.

"Section 303 (a) As used in this part—(17) the term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

B. State Legislation

Act 397 of the Acts of Arkansas of 1955 (Arkansas Motor Carrier Act of 1955):

"Section 3. The provisions of this Act except as hereinafter specifically limited, shall apply to the transportation of passengers or property by motor carriers over public highways of this State, and the procurement of, and provisions of, facilities for such transportation; and the regulations of such transportation, and the procurement thereof and the provisions of facili-

ties therefor, is hereby vested in the Arkansas Public Service Commission.

"Section 4. Nothing herein shall be construed to interfere with the exercise by agencies of the government of the United States of its power of regulation of interstate commerce.

"Section 5. (a) As used in this Act—

"(7) The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or indirectly, or by lease of equipment or franchise rights, or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public by motor vehicle for compensation whether over regular or irregular routes.

"(8) The term 'contract carrier by motor vehicle' means any person not a common carrier included under Paragraph 7, Section 5 (a) of this Act who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights, or any other arrangements, transports passengers or property by motor vehicle for compensation.

"(9) The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle, and any person performing for-hire transportation service without authority from the Commission.

"(14) The term 'private carrier' means any person engaged in the transportation by motor vehicle upon public highways of persons or property, or both, but not as a common carrier by motor vehicle or a contract carrier by motor vehicle, and includes any person

who transports property by motor vehicle, where such transportation is incidental to or in furtherance of any commercial enterprise of such person, other than transportation.

"(19) The term 'lease' used in connection with the term 'motor vehicle' means the rental of a 'motor vehicle' by a lessor to a lessee, except to an authorized carrier, with nothing furnished except necessary maintenance.

"Section (6). (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this Act and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, and transportation of baggage and express; and may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records and safety of operation and equipment which shall conform as nearly as may be consistent with the public interest to the system of accounts, records, and reports and the requirements as to the preservation of records and safety of operation and equipment now prescribed, or which may from time to time be prescribed, by the Interstate Commerce Commission for common carriers by motor vehicles engaged in interstate or foreign commerce.

"(2) To regulate contract carriers by motor vehicles as prescribed by this Act, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records and safety of operation and equipment now prescribed, or which may from time to time be prescribed, by the Interstate Com-

merce Commission for contract carriers by motor vehicles engaged in interstate or foreign commerce.

"(3) To regulate private carriers, as defined herein, with respect to safety of their operations and equipment.

"Section 11. (a) No person shall engage in the business of a contract carrier by motor vehicles over any public highways in this State unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such persons to engage in such business.

"Section 22. (a) Any motor carrier using the highways of this State without first having obtained a permit or certificate from the Commission, as provided by this Act, or who being a holder thereof violates any term, condition or provision thereof, shall be subject to a civil penalty to be collected by the Commission, after notice and hearing, in an amount of not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), and if said penalty be not paid within ten (10) days from the date of the order of the Commission assessing same, twenty-five percent (25%) thereof shall be added thereto.

"(b) Any person, who by lease or otherwise permits the use of a motor vehicle or vehicles by other than a carrier holding authority from this Commission, and who furinshes in connection therewith a driver or drivers, either directly or indirectly, or in any manner whatsoever exercises any control, or assumes any responsibility over the operation of such vehicle or vehicles, during the period of such lease or other device, shall be deemed a motor carrier."